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U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re The Perfumer's Workshop, Ltd.

Serial No. 74/617,171

Norris D. Wolff of Kleinberg, Kaplan, Wolff & Cohen for The Perfumer's Workshop, Ltd.

George C. Pologeorgis, Trademark Examining Attorney, Law Office 107 (Thomas S. Lamone, Managing Attorney).

Before Sams, Cissel and Hairston, Administrative Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

An application has been filed by The Perfumer's Workshop, Ltd. to register the mark shown below

for "perfumes, eau de toilette, and colognes."[1]

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[1] Application Serial No. 74/617,171 filed January 3, 1995, alleging a bona fide intention to use the mark in commerce. The term "Perfumer's" is disclaimed apart from the mark as shown.

The Trademark Examining Attorney has refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when applied to the identified goods, so resembles the previously registered mark shown below

WATERCOLORS
BY H_2O PLUS

for "cosmetics; namely, lip gloss, lip stick, lip pencil, face powder, pressed powder, mascara, eye shadow, eye liner, blush, foundation, concealer, [and] nail polish;"[2] and "retail store services in the fields of personal care and beauty products,"[3] as to be likely to cause confusion.

When the refusal was made final, applicant appealed. Applicant and the Examining Attorney have filed briefs, but no oral hearing was requested.

Turning first to a consideration of the respective goods and services, we note that it is not necessary that goods and/or services be identical or even competitive in nature to support a likelihood of confusion. It is sufficient that the circumstances surrounding their marketing are such that they would be encountered by the same persons under circumstances that would give rise, because of the marks used in connection therewith, to the

[2] Registration No. 1,808,735 issued December 7, 1993.

mistaken belief that the goods/services originate from or are in some way associated with the same source. See In re International Telephone and Telegraph Corp., 197 USPQ 910 (TTAB 1978).

In this case, we agree with the Examining Attorney that applicant's perfumes, eau de toilette, and colognes are closely related to registrant's cosmetics. See Capri Cosmetics, Inc. v. Nina Ricci S.A.R.L., 142 USPQ 361 (TTAB 1964) [Cosmetics and beauty preparations and perfumes are closely related goods]. Applicant has attempted to distinguish the trade channels in which the parties' goods move, contending that registrant's cosmetics are sold only in registrant's retail stores. However, as the Examining Attorney correctly observes, the cited registration has no limitation of any sort and the cosmetics listed therein must be presumed to move in all channels of trade normal for such goods. See In re Davis Cleaver Produce Company, 197 USPQ 248 (TTAB 1977). Thus, in our likelihood of confusion analysis, we must assume that applicant's perfumes, eau de toilette, and colognes and registrant's cosmetics are sold in all channels of trade normal for such goods, i.e., mass merchandisers, drug stores, discount stores and department stores. Further, there is without question a connection between retail store services in the fields of personal care

[3] Registration No. 1,820,263 issued February 8, 1994.

and beauty products and personal care products such as perfumes, eau de toilette, and colognes. We find, therefore, that applicant's perfumes, eau de toilette, and colognes and registrant's cosmetics and retail store services in the fields of personal care and beauty products are sufficiently related that if the same or similar marks are used in connection therewith, confusion as to source would likely occur.

Turning then to a consideration of the marks, we find that applicant's mark PERFUMER'S WORKSHOP WATERCOLORS and design and the registered mark WATERCOLORS BY H2O PLUS engender similar overall commercial impressions. In considering the marks, we recognize that the house marks, namely, PERFUMER'S WORKSHOP and H2O PLUS, in the respective marks cannot be ignored. However, although we have resolved likelihood of confusion upon consideration of the marks in their entireties, there is nothing improper in giving more weight, for rational reasons, to a particular feature of the mark. In re National Data Corp., 753 F.2d 1056, 224 USPQ 748, 751 (Fed. Cir. 1985). In this case, we have given more weight to the word WATERCOLORS in each of the respective marks. We have done so because WATERCOLORS is displayed in prominent fashion in applicant's mark and WATERCOLORS is the first word in registrant's mark followed by its house mark. Finally, in finding that the marks are similar, we have kept

in mind the normal fallibility of human memory over time and the fact that the average consumer retains a general rather than a specific impression of trademarks encountered in the marketplace. This is particularly true here, because the goods can be relatively inexpensive and bought off the shelf in drug stores and mass merchandisers, under conditions in which consumers will not take great care in making their purchases.

Applicant contends that marks consisting of or containing the word WATERCOLORS are weak marks and therefore entitled to only a limited scope of protection. In support of its claim, applicant submitted a list of third-party registrations of marks consisting of or containing the word WATERCOLORS. However, as the Examining Attorney points out, simply submitting a list of registrations does not make the registrations of record. Only submission of copies of such registrations would have made them of record. In re Duofold Inc., 184 USPQ 638, 640 (TTAB 1974). Moreover, even if copies of the registrations had been made submitted and the registrations were in agreement with the list provided by applicant, such third-party registrations, without evidence that the marks therein are in actual use, would have little probative value on the issue of whether confusion is likely in this case. In re Hub Distributing, Inc., 218 USPQ 284 (TTAB 1983). Third-party registrations are not evidence of

use of the marks in such registrations. Charrette Corp. v. Bowater Communications Papers, Inc., 13 USPQ2d 2040 (TTAB 1989). Another reason the third-party registrations would not be particularly useful to our analysis, even if they had been submitted, is that none of the registrations covers goods or services of the type involved herein.

While no doubt the word WATERCOLORS is suggestive of registrant's cosmetics, this fact does not help to distinguish the parties' marks. It is well settled that a suggestive mark is entitled to protection against the registration by a subsequent user of the same or similar mark for related goods and services. In re Textron, Inc., 180 USPQ 341 (TTAB 1973).

We conclude that consumers familiar with registrant's cosmetics and retail store services in the fields of personal care and beauty products offered under the mark WATERCOLORS BY H2O PLUS, would be likely to believe, upon encountering applicant's mark PERFUMER'S WORKSHOP WATERCOLORS for perfumes, eau de toilette, and colognes, that the goods and services originated with or are somehow associated with the same source.

Finally, it is well settled that, if there is any doubt on the issue of likelihood of confusion, that doubt must be resolved against the newcomer and in favor of the prior user and registrant. In re Pneumatiques, Caoutchouc Manufacture

et Plastiques Kleber-Colombes, 487 F.2d 918, 179 USPQ 729 (CCPA 1973).

Decision: The refusal to register under Section 2(d) of the Trademark Act is affirmed.

J. D. Sams

R. F. Cissel

P. T. Hairston
Administrative Trademark Judges, Trademark Trial and Appeal Board